# CENTER FOR REGULATORY REASONABLENESS

1620 I Street, N.W.
Suite 701
Washington, DC 20006
Telephone: 202-600-7071
Fax: 202-463-4207

www.centerforregulatoryreasonableness.org


November 4, 2016

**Via FOIA Online**

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

**RE: Freedom of Information Act Request**
**Subject: EPA Guidance on MS4 Permit Requirements for Discharges to § 303(d) Impaired Waters**

Dear National FOIA Officer:

The Center for Regulatory Reasonableness ("CRR" or "Center") herewith submits this request for a public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq., as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2. Please note that the U.S. Department of Justice instructs, and such instruction is used here, that: "Since 1996 the FOIA has defined the term "record" as including "any information that would be an agency record subject to the requirements of [the FOIA] when maintained by an agency in any format, including an electronic format." *Department of Justice, Office of Information Policy (OIP) Guidance*, at 1.2.

## ***Background***

EPA Region 1 has recently issued final general stormwater permits for National Pollutant Discharge Elimination System ("NPDES") dischargers within Massachusetts. An essentially identical permit is proposed for adoption in New Hampshire, containing permit conditions seen in a number of other states as well. Many of these provisions place stricter limitations on MS4 permittees, in some cases necessitating tremendous expenditures and additional facility upgrades.

## ***Request***

Specifically, this Request seeks the following: EPA HQ guidance[1] ("Guidance"), dated from *April 2011 to the date of this request,* provided to Regional Offices and/or delegated States concerning requirements that should be imposed on MS4 communities discharging to or above any waters listed as impaired under Section 303(d) of the Clean Water Act. *See, e.g.*, General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts, § 2.2 – 2.2.2., at 14-27 (Ex. A).

This is a straightforward and easy to understand request. Given the definition of the records sought – "guidance" – there cannot be any valid claims of privilege, or of any right to withhold a responsive document to this request, and FOIA expressly precludes withholding such documents. Finally, please note that CRR requests a fee waiver for this request.

This Request should not be aggregated with other FOIA requests filed with the EPA by CRR regarding other MS4 permitting issues. Such action would only delay the FOIA response process and is not authorized by EPA FOIA regulations in this instance. EPA regulations only allow the Agency to aggregate requests if it believes a party is attempting to circumvent fees (40 C.F.R. § 2.107(i)), this request does not do so. The OMB Fee Guidelines explain that the intent of the FOIA aggregation rule is to prevent requestors from breaking up a large request into many small pieces that can be processed under two hours labor and under 100 pages of results, as FOIA requires all requests under those two thresholds be produced without costs to all non-commercial requesters. *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 Fed. Reg. at 10,019-20 (Mar. 27, 1987) (codified as Pub. L. 99-570). Given that EPA's prior cost assessment for this information was well in excess of $250 (actually tens of thousands of dollars), there is no possibility that CRR's individual submissions could exploit FOIA to avoid fees for Agency research. Additionally, the Center submits a fee waiver with this request, as it is both eligible and entitled to a waiver of fees for release of information under FOIA, and thus negates any argument that the Requestor is attempting to file multiple requests to avoid payment of fees.

## ***Request for Fee Waiver***

### ***CRR's Fee Waiver Request Meets Applicable Requirements***

The nature of the CRR request fully meets the applicable basis for fee waiver, under applicable EPA regulations at 40 C.F.R. §§ 2.107(l) (1) – (3) (hereinafter "Sec. 2.107" with appropriate sub-sections). EPA must find, based on extant facts, "that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." The CRR request here is also entirely supported by the analysis of the fee waiver provisions of the FOIA in *Cause of Action v. Federal Trade Commission,* 799 F.3d 1108 (D.C. Cir. 2015) ("*Cause of Action*"), and other FOIA case law. In

[1] Per FOIA, 5 U.S.C. § 552(A)(2), we define Agency "guidance" as "(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public."

addition to the discussion above, the following reviews the CRR request against the EPA regulatory standards (consideration of which is mandatory to EPA):

A. *First Fee Waiver Requirement*: "[D]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government[.]":

- *Subject of the FOIA Request* (Sec. 2.107(l)(2)(i)): This CRR request deals solely and entirely with "the operations or activities of the government." The Center, as Requester, seeks only to learn the content of any Clean Water Act Section 303(d) guidance on water quality protection and its application to state and federal issued permits for MS4 communities. As such, the subject areas for which records are sought involve EPA regulations, communications, and administrative manuals concerning its Section 303(d) policies. EPA, by law, drafts and ultimately approves the permits and their conditions; the public has a right to know what the Agency is doing, and by what authority.

- *Informative Value of the Information to be Disclosed* (Sec. 2.107(l)(2)(ii)): The information sought in this request is certainly "'likely to contribute' to an understanding of government operations or activities." *Id.* Permittees are entitled to understand on what basis the federal government is placing requirements in stormwater permits. The EPA response will be instructive to the public, and to all permittees, in explaining by what authority it can limit, for example, plant expansion, economic growth, *et al*., including application and definitions provided to purported Section 303(d) requirements. Without a full understanding of such information and the manner by which EPA is planning to enforce new requirements, and to direct delegated States to also enforce them, stormwater dischargers will be in the dark regarding important permit conditions. This information is particularly vital as local communities and businesses must make informed economic decisions concerning important infrastructure development, future compliance monitoring, compliance costs, and asserting their rights to seek redress for the imposition of unlawful requirements – among other issues.

- *Disclosure Contributes to Public Understanding of the Subject* (Sec. 2.107(l)(2)(iii)): The Center is more than capable of quickly and efficiently disseminating this information to the interested public, CRR's members, and the broader municipal wastewater industry. CRR's Executive Director and General Counsel have decades of environmental law experience, both in private and governmental capacities allowing the expeditious and effective dissemination of the information obtained from EPA to the Center's client base and others that read the Center's Newsletter.[2] Looked at a different way, without EPA's full disclosure, the public will be in the dark regarding how, and with what authority, EPA seeks to regulate stormwater; conditions that directly impact areas of traditionally local concern, such as infrastructure development, growth decisions, and the like. CRR specifically intends to take the documents received from EPA's Response to this request and integrate their contents into a regulatory alert or broader newsletter to be disseminated to the interested public and constituent

[2] *See, e.g.*, Newsletter, of February 2015, found here: http://static1.squarespace.com/static/52eb2b55e4b00030838c3c03/t/55afed05e4b082155fd35993/1437592837628/CRR_Newsletter_02_2015.pdf.

members, consisting of numerous municipal entities devoted to management and construction of wastewater treatment facilities within New England, and made available online for the broader public.

- *Significance of Contribution to Public Understanding* (Sec. 2.107 (l)(2)(iv)):

This query has largely been asked and answered above. No one in the public knows the basis by which the Agency has addressed water quality protection concerns for MS4 communities on, and how the Agency has also worked with States to impose this federal requirement. If disclosure of this information is refused by EPA, the affected public will continue not to know the "how and why" of their own permit conditions. As to this, and the immediately preceding, points, *Cause of Action* has emphasized that a more nuanced agency approach to FOIA compliance is required regarding the size of the public audience to be reached, and the significance of the information imparted. Essentially, that the court agreed with bill sponsor statements that "[p]ublic understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter." 799 F.3d at 1116, n. 6. Here, CRR represents members of a group of municipal permittees in Massachusetts, New Hampshire, and many other States that may have received improper EPA direction on MS4 permit requirements; this is clearly a "subset" of the most interested public, those who are adversely affected by the stormwater permitting conditions mentioned.

Concerning this point, "[t]he statute requires only that the disclosure be likely to contribute significantly to 'public' understanding." *Cause of Action*, 799. F.3d at 1115-1116. *See also*, 5 U.S.C. § 552(a)(4)(A)(iii). CRR cannot be required to show that it reach a "broad segment" of the public, or a "wide audience," or "a broad cross-section of the public." Its efforts will certainly reach the "sub-set" of entities impacted by the EPA rulemaking; such impact is all that can be legitimately required.

B. <u>*Second Waiver Requirement*</u>: "[] and is not primarily in the commercial interest of the requester."

- *Existence and Magnitude of Commercial Interest* (Sec. 2.107(l)(3)(i)): CRR does not have an MS4 permit and does not stand to benefit alone from the information sought. Instead, CRR seeks this information to advise the public, and other permittees, of the basis for EPA stormwater permitting decision-making. Moreover, the affected public has a critical economic stake in what EPA demands in its permit actions and how compliance is demonstrated. The many issues involved, including anti-degradation requirements, growth restrictions, more stringent water quality-based permit limitations, all impact wide classifications of stormwater permittees. Even if CRR received a benefit, however, EPA could not impose an exclusive "commercial" interest bar to providing the requested information without cost: "But since the 1986 amendments, it no longer matters whether the information *will also (or even primarily) benefit the requester*. Nor does it matter whether the requester made the request for the *purpose* of benefitting itself. The statutory criterion focuses only on the likely *effect* of the information

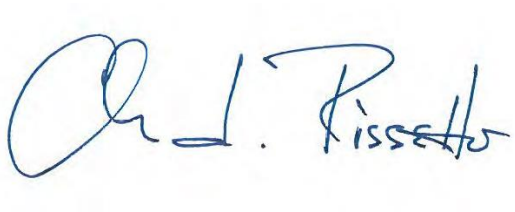
disclosure." (First emphasis supplied; second in original.) *Cause of Action,* 799 F.3d at 1117.[3] EPA cannot impose limitations at odds with the FOIA and controlling case law.[4]

- *Primary Interest in Disclosure* (Sec. 2.107(l)(3)(ii)): EPA regulation states that "[a] fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure." *Id*. While CRR fully meets the EPA announced test; the Agency's standard itself must be construed consistently with *Cause of Action.* Recall that the Court there recognized that it did not matter whether the primary benefit of the information goes to the requester (or even if that was intended), rather, "[t]he statutory criterion focuses only on the *effect* of the information disclosure." 799 F.3d at 1117 (Emphasis in original). Here, the *effect* of the information requested, once received, will directly benefit both adversely affected stormwater dischargers, as well as those that must yet deal with EPA and who anticipate, or have been advised, that they will receive adverse requirements.

In closing, CRR respectfully requests that the Agency: (1) timely provide the documents requested; and (2) grant the Center's request for a fee waiver in this matter. Please contact the undersigned if you have any questions, beyond any make-weight argument for additional time or clarification.

Thank you.

Respectfully,



Christopher L. Rissetto, General Counsel
Center for Regulatory Reasonableness
Crissetto@crr.gmail.com

[3] Nor did the *Cause of Action* Court have any difficulty avoiding recognizing the "commercial" tag for Cause of Action, even though it directly benefitted from the results of its FOIA request – which was to obtain information about the FTC award of fee waivers, which would assist Action's own fee waiver request: "But Action's interest in information regarding the FTC's treatment of fee-waiver applications (including Action's own) is not rendered "commercial" merely because the information could help it obtain a fee waiver." 799 F.3d at 1117. Here, CRR's interest is in advising the reasonably defined sub-set of the public about EPA's authority, and implementation of an important regulatory action, which has potentially material adverse impacts to them.

[4] EPA's focus on consideration of "any commercial interest" cannot pervert the meaning of the fee award provision of the law. As is clear from *Cause of Action* and other cases, the obtaining of a benefit does not transform an interest into one that is "primarily in the commercial interest of the requester." Moreover, a law firm's "commercial interest" must be construed as primarily that of its clients, and not that of the firm itself. Any other understanding of this phrase would potentially bar clients from legal representation, an authority that EPA entirely lacks.